

Kuala Lumpur Finance Bhd v KGV & Associates Sdn Bhd

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D1-22-756-91
SHAIK DAUD J
10 MAY 1994

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Civil Procedure — Pleadings — Striking out statement of claim — Limitation — Professional negligence — Whether time begins to run from date of negligent act or when negligence is discovered — Rules of the High Court 1980 O 18 r 19

Civil Procedure — Amendment — Addition of date when cause of action arose — Limitation — Whether amendment should be allowed

C

Tort — Negligence — Professional negligence — Property valuers — Liability for false valuation report — When time begins to run — Limitation

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The plaintiff intended to grant a loan to a borrower ('the borrower') on the security of a charge over property situated at Lot 2506 Mukim Semenyih, Hulu Langat, Selangor ('the property'). The borrower employed the defendant to carry out a valuation of the property. The defendant submitted a valuation report dated 18 October 1984 ('the report') stating that there was a double storey house erected on the property and the property was valued at a fair market value of RM260,000 and a forced sale value of RM220,000. The plaintiff, relying on the report, disbursed a loan of RM150,000 on 14 December 1984 to the borrower on the security of a charge over the property. The borrower defaulted, and on 6 March 1989, the plaintiff called for another valuation report ('the second report') from another firm of valuers which showed that the defendant's report was totally false, ie at the material time, there was no house on the property and its sale value was only RM53,000. In consequence, the plaintiff filed a suit against the defendants, as valuers, for professional negligence and/or fraud, claiming that they had suffered loss as the loan was never repaid from the very beginning. The plaintiff claimed as special damages the loan amount of RM150,000 with interest of 15-17%pa and general damages. The defendant applied to strike out the plaintiff's claim under all the four limbs of O 18 r 19 of the Rules of the High Court 1980 contending that the claim arose on 14 December 1984 since there was a default from the beginning, and was therefore time-barred. On the other hand, the plaintiff contended that the cause of action arose when the negligence and/or fraud was discovered, ie on 6 March 1989, and applied to amend its statement of claim to insert that date. The main issue before the court was when the cause of action arose.

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Held, dismissing the defendant's application:

- (1) The plaintiff's application to amend its statement of claim was allowed. Where a pleading is capable of being amended to correct

- A any defect, leave to amend should be given rather than to strike it out.
- (2) The negligence and fraud were not by the borrower but by the defendant as valuer. The borrower's failure to repay the loan was a separate loss altogether for which the plaintiff was also entitled to sue the borrower. Therefore, the cause of action arose not at the time the borrower defaulted but at the time the plaintiff discovered the defendant's negligence and/or fraud, ie the damage occurred only when the plaintiff received the second report. Therefore, the cause of action arose on 6 March 1989 and as such, the plaintiff's claim was not statute-barred.
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[Bahasa Malaysia summary]

- D Plaintiff berniat memberikan satu pinjaman kepada seorang peminjam ('peminjam itu') atas jaminan suatu gadaian atas tanah yang terletak di Lot 2506 Mukim Semenyih, Hulu Langat, Selangor ('harta itu'). Peminjam telah menggaji defendan untuk menjalankan suatu penilaian harta itu. Defendan telah mengemukakan suatu laporan penilaian yang bertarikh 18 Oktober 1984 ('laporan itu') yang menyatakan bahawa terdapat sebuah rumah dua tingkat yang didirikan di atas harta itu dan harta itu dinilai pada nilai pasaran berpatutan sebanyak RM260,000 dan nilai jualan paksa sebanyak RM220,000.
- E Plaintiff telah bergantung pada laporan itu dan memberi pinjaman sebanyak RM150,000 kepada peminjam pada 14 Disember 1984 atas jaminan satu gadaian ke atas harta itu. Peminjam telah ingkar dan, pada 6 Mac 1989, plaintiff telah memesan untuk satu laporan penilaian yang lain ('laporan kedua itu') daripada firma penilai yang lain yang menunjukkan bahawa laporan defendan kesemuanya palsu, iaitu pada masa material, tidak ada rumah di atas harta itu dan nilai jualannya hanya sebanyak RM53,000. Akibatnya, plaintiff telah memfailkan suatu guaman terhadap defendan, sebagai penilai, atas kecuaiian profesional dan/atau fraud, dan mendakwa bahawa mereka telah mengalami kerugian kerana pinjaman itu tidak pernah dibayar balik dari awal lagi. Plaintiff menuntut jumlah RM150,000 sebagai ganti rugi khas dengan faedah pada kadar 15-17% setahun dan ganti rugi am. Defendan memohon untuk membatalkan tuntutan plaintiff di bawah keempat-empat cabang A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 dan menegaskan bahawa tuntutan itu telah timbul pada 14 Disember 1984 kerana terdapat keingkaran dari mula-mula lagi dan oleh itu dihalang oleh had masa. Sebaliknya, plaintiff menegaskan bahawa kausa tindakan itu telah timbul apabila kecuaiian dan/atau fraud itu diketahui, iaitu pada 6 Mac 1989, dan memohon untuk meminda pernyataan tuntutannya untuk memasukkan tarikh itu. Isu utama di hadapan mahkamah ialah bila kausa tindakan itu telah timbul.
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Diputuskan, menolak permohonan defendan:

- (1) Permohonan plaintiff untuk meminda pernyataan tuntutannya dibenarkan. Di mana sesuatu pliding boleh dipinda untuk

membetulkan sebarang kecacatan, kebenaran untuk meminda
seharusnya diberikan dan bukan membatalkannya. A

- (2) Kecuaian dan fraud itu tidak dilakukan oleh peminjam tetapi oleh defendan sebagai penilai. Kegagalan peminjam untuk membayar balik pinjaman itu adalah suatu kerugian yang berasingan sama sekali untuk mana plaintif juga berhak mendakwa peminjam. Oleh itu, kausa tindakan telah timbul bukan apabila peminjam itu ingkar tetapi apabila plaintif mengetahui tentang kecuaiian dan/atau fraud yang dilakukan oleh defendan, iaitu kehilangan itu berlaku hanya apabila plaintif menerima laporan kedua itu. Oleh itu, kausa tindakan itu telah timbul pada 6 Mac 1989 dan dengan demikian, tuntutan plaintif tidak dihalang oleh had masa.] B C

[*Editorial Note*: The defendant has appealed to the Federal Court vide Civil Appeal No 02-32-94.]

Notes D

For cases on professional negligence, see 12 *Mallal's Digest* (4th Ed) paras 357-375; [1989] *Mallal's Digest* 1498, 1507; [1990] *Mallal's Digest* 1180-1181, 1195; [1991] *Mallal's Digest* 1963; [1993] *Mallal's Digest* 1289-1290.

For cases on striking out pleadings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2649-2769. E

Cases referred to

Bandar Builders & Ors v United Malayan Banking Corp Bhd [1993] 3 MLJ 36 (folld) F

Pirelli General Cable Works Ltd v Oscar Faber & Partners [1983] 2 AC 1; [1983] 1 All ER 65; [1983] 2 WLR 6 (distsd)

Legislation referred to

Limitation Act 1953 s 6(1)(a)

Rules of the High Court 1980 O 18 r 19 G

Leong Mun Ying (*Yusuf Lee Pathma & Marbeck*) for the plaintiff.

Tunku Farik Ismail (*Azim Ong & Krishnan*) for the defendant.

Cur Adv Vult H

Shaik Daud J: The plaintiff is a licensed finance company and the defendant is carrying on the business of property valuation. Prior to 18 October 1984, one Ah Loy trading as Nyet Yoon Enterprise ('the borrower') applied for a loan from the plaintiff and as security intended to charge a piece of property situated at Lot 2506 Mukim Semenyih, Hulu Langat, Selangor. The borrower employed the defendant to make a valuation of the said property. I

- A Consequently, the defendant submitted a valuation report dated 18 October 1984 and in that report, inter alia, stated:
- (a) there was a double storey house of less than four years erected on the said property; and
- B (b) they valued the said property at a fair market value of RM260,000 and a forced sale value of RM220,000.

C The plaintiff, relying on the valuation report, granted a loan of RM150,000 to the borrower on the security of a charge of the said property. The plaintiff claims that in truth and in fact the statement contained in the valuation report was misleading and/or false and untrue in that there was no house at all erected on the said property and that the fair market or forced sale value of the said property was not as stated by the defendant. In consequence, the plaintiff claims that they had suffered loss as the loan was never repaid from the very beginning. Therefore, the plaintiff filed this suit against the defendant claiming as special damages the loan amount of

D RM150,000 with interest ranging from 15–17%pa. They also claimed general damages.

E The defendant entered appearance and filed their statement of defence denying the plaintiff's claim and alleging negligence on the part of the plaintiff. The defendant then filed this application by summons-in-chambers for an order that the plaintiff's claim be struck off under all the four limbs of O 18 r 19 of the Rules of the High Court 1980.

F Now it is trite law that this rule enforces the rule of pleadings and empowers the court in a summary manner, without holding a trial, to order stay or to dismiss an action or enter judgment accordingly where the pleadings disclose no reasonable cause of action or defence or is scandalous, frivolous or vexatious or it prejudices, embarrasses or delays the fair trial of the action or it is otherwise an abuse of the process of the court. There is no dearth of authorities on the principles upon which the court ought to act in exercising its power under any of the four limbs of this rule. There is no doubt that the power to dismiss an action summarily without a trial

G is indeed a drastic power. Therefore, only in plain and obvious cases that recourse be had to this summary procedure under the rule.

The Supreme Court recently in dismissing a similar application expressed the same sentiments, where the court in *Bandar Builders & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36 said at p 43:

- H The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule per Lindley MR in *Hubbuck & Sons v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86, and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *A-G of Duchy of Lancaster v L & NW Rly Co* [1892] 3 Ch 274). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence ...
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It is also settled law that the mere fact that the case is weak and unlikely to succeed is no ground for striking out and also where the pleadings can be amended, leave under the rule to amend will almost always be given. In other words if there are defects in the pleadings resulting in the other party applying to strike out, and if an amendment can correct the defect, the courts generally would not act summarily.

Having set out the relevant law, I have now to see if the plaintiff's claim necessitates me to allow the defendant's application to strike out the plaintiff's claim summarily. First, it must be mentioned that the plaintiff had in fact filed a summons-in-chambers which is also before me today seeking to amend their statement of claim.

Tunku Farik Ismail for the defendant submits that since the plaintiff's claim is based on negligence and fraud, the claim is time-barred as it was filed over six years after the cause of action had arisen. He contends that the cause of action arose on 14 December 1984 but the suit was filed on 31 May 1992 which is well over six years. He pointed to the plaintiff's statement of claim where it is stated that since the disbursement of the loan on 14 December 1984, the borrower made no repayment whatsoever, therefore there had been a default since the very beginning and since the plaintiff said that they suffered damages from the very beginning, the cause of action therefore arose on 14 December 1984. Therefore, the plaintiff's claim is statute-barred by virtue of s 6(1)(a) of the Limitation Act 1953. He contends that the basic rule is that the cause of action accrues when damage is suffered and that the cause of action is complete when there is a plaintiff who can sue and a defendant who can be sued.

The question, therefore, here is when did the cause of action arise? Learned counsel for the defendant reckons that the cause of action arose on 14 December 1984 when the plaintiff disbursed the loan to the borrower and when the borrower failed to repay. The learned counsel for the plaintiff on the other hand contends that this being a claim for negligence and fraud, not against the borrower, the fact that the borrower defaulted from the beginning is immaterial. The negligence and fraud here is not by the borrower but by the defendant as valuer. The fact that the borrower defaulted is another issue altogether for which the plaintiff is also entitled to sue the borrower. The borrower's failure to repay the loan is another and a separate loss altogether. Therefore, the cause of action should not be from the time the borrower defaulted but from the time the plaintiff discovered the negligence and/or fraud of the defendant. With this contention, I agree. The plaintiff's claim herein has nothing to do with the default by the borrower, which default has no connection with the plaintiff's alleged negligence and/or fraud. The plaintiff here is not claiming for the repayment of the loan it gave to the borrower but they are claiming as special damages the amount they lost as result of the defendant's negligence and/or fraud. Therefore, I agree that the date the cause of action arose here ought not to be the date the borrower defaulted but ought to be the date the plaintiff discovered the negligence and/or fraud. Learned counsel for plaintiff submits further that it is this date of discovery that the plaintiff inadvertently omitted to put in their pleading for which they have now

- A applied to amend their statement of claim which application is also before me. It is also settled that where a pleading is capable of being amended so as to correct any defect, leave to amend should be given rather than to strike it out. Learned counsel for the plaintiff submits that while the defendant may have been guilty of negligence and/or fraud on 18 October 1984, the plaintiff only discovered the negligence and/or fraud on 6 March 1989 when the plaintiff called for another valuation report from another firm of valuers which report showed that the defendant's report was totally false. The latter report showed that at the material time, there was no house on the said land and the sale value was only RM53,000. Therefore, in my view, based on the circumstances of this case, the date the cause of action arose ought to be 6 March 1989 and that being so, the plaintiff's claim is not statute-barred.

- Learned counsel for the defendant in countering this argument submits that if the court accepts the date the cause of action arose not being the date the borrower defaulted, then he contends that the date ought to be the date when the negligence and/or fraud occurred and not when the plaintiff discovered it, which in turn means that we are now back to the 1984 date. For this proposition, he relied on the case of *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1; [1983] 1 All ER 65; [1983] 2 WLR 6, where the House of Lords held that the date of accrual of a cause of action in tort for damage caused by negligent design or construction of a building was the date when the damage came into existence, and not the date when the damage was discovered or could with reasonable diligence have been discovered. With respect, I do not think that that finding can be applied in the present case as the circumstances are different. In that case, the House of Lords was considering damage caused by the negligent design or construction but in the present case it is not one based on negligent design or construction. In the present case, the damage caused by the alleged negligence and/or fraud of the defendant occurred only when the plaintiff received the latter valuation report.

- For the above reasons, I hold that the plaintiff's claim is not statute-barred and since the defendant's application is based solely on this ground, their application must fail and, accordingly, I hold that this is not such a clear-cut case for me to exercise my discretion under O 18 r 19 and in the premises the defendant's application is dismissed and costs to the defendant.

Application dismissed.

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Reported by Chan En-Lai

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